IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 265 of 2007 (O&M)
Date of decision 30. 7 .2007

Pawan Kumar Garg .. Appellant

Versus

CIT Aaykar Bhawan, Ludhiana .. Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

PRESENT: Mr.Rajiv Sharma, Advocate for the Appellant

M.M.Kumar, J.

This appeal filed under Section 260A of the Income Tax Act,1961 (for brevity 'the Act') challenges order dated 24.5.2006 passed by the Income Tax Appellate Tribunal, Chandigarh Bench arising out of ITA No.262/Chandi/2004 for the assessment year 1998-99 (Annexure A/1). The assessee has also filed an application under Section 5 of the Limitation Act,1963 read with Section 260A of the Act for condonation of 294 days delay in filing the appeal.

The appellant has claimed that following substantive questions of law would arise for our determination:

> " I.Whether, on the facts and circumstances of the case, the ITAT was justified in confirming the action of A.O. and by wrongly reversing the orders of CIT(A) in not allowing legal deduction as claimed by the appellant u/s 54F of the Income Tax Act,1961 by completely ignoring the CBDT Circular which is binding on the A.O.
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> II.Whether, on the facts and circumstances of the case, the ITAT was justified in confirming the action of A.O. and by

wrongly reversing the orders of the CIT(A) in not allowing legal deduction as claimed by the appellant u/s 54 F of the Income Tax Act,1961 by completely ignoring the CBDT circular which is binding on the A.O.which clearly lays down that the purchase of plot for further construction of residential house will also qualify for the impugned deduction, so that so, the denial of deduction to the appellant on the amount of capital gain spent for the purchase of plot from PUDA is bad in law and a perverse finding of fact and law.

III.That without prejudice to what is stated above even if the Ld. AO was not satisfied, regarding construction of residential house within the stipulated period of three years, the addition should have been made in the year in which the period of three years lapsed, as provided for in section 54F(4) and not before. Hence, even on this score, addition was bound to be set aside and has been correctly set aside by Ld. CIT(A).

IV. Whether, on the facts and circumstances of the case, the findings of ITAT are perverse and against the evidences on record thus unsustainable in law.

V.Whether, the ITAT has misdirected itself in being influenced by irrelevant factors and applying erroneous criteria while deciding the issue in dispute."

Facts which are necessary for the disposal of the controversy raised are that the assessee filed the return on 11.10.1998 declaring the income of Rs.1,38,771/- plus agricultural income of Rs. 1,64,086/- which was processed under Section 143(1)(a) of the Act. Thereafter, notice under

Section 143(2) of the Act was issued on 27.9.1999 which was served on the assessee-appellant on 28.9.1999. The Assessing Officer held discussion with the assessee- appellant to produce books of account. The assessee has shown long term capital gain of Rs. 4,64,400/- on the sale/purchase of 2900 shares. He also claimed exemption under Section 54 F of the Act in lieu of the purchase of residential plot. The Assessing Officer found that the exemption claimed under Section 54F of the Act was unwarranted as the afore-mentioned provision was not applicable to the facts of the present case because it could be attracted only if the gain has been invested on the construction of a residential house and not on the purchase of a residential plot. The assessee furnished details regarding construction of the house but the same was not accepted by the Assessing Officer because there was a report submitted by the Commissioner, Municipal Corporation, Ludhiana who has pointed out that Kashmira Singh, XEN visited the plot No.1021 Urban Estate Phase II Jamalpura (Ludhiana). According to the Executive Engineer, the main gate was locked and on enquiry made from the neighbourer it was found that only a boundary wall and two rooms with AC Sheet roofing for use of storage of cement etc. were constructed approximately in the month of February, 2001. The Assessing Officer further recorded that infact at the time of filing the return the assessee had made erroneous claim in the belief that the return is unlikely to be taken up for scrutiny and his claim would not come to the notice of the Revenue. The claim of the assessee that he had built up two small rooms which constitute an independent dwelling unit and therefore he was entitled to clarification of circular No. 667 dated 18.10.1993 issued by the Central Board of Direct Taxes was rejected because it was held that the construction of those two

rooms do not constitute to be a dwelling unit and those rooms were constructed only in the month of February, 2001. Accordingly, the claim made under Section 54 F of the Act was rejected and penalty proceedings under Section 271(1)(c) of the Act were initiated for making a wrong claim.

On appeal preferred by the assessee the Commissioner of Income Tax (A) reversed the view taken by the Assessing Officer after concluding that the appellant could have utilised the amount of capital gain of Rs.5,11,560/- declared on 22.4.1997 within a period of three years i.e. on or before 22.4.2000. The CIT(A) found that the period did not expire at the time of filing the return on 11.10.1998. He further held that circular of the Board No. 667 dated 18.10.1993 is to be applied and the cost of the land was required to be treated as an integral part of the residential house. He brushed aside the report of the Executive Engineer, Estate Officer, Punjab Urban Development Authority and the Inspector and concluded that the assessee- appellant had erected two room residential unit which may not be called expensive but nevertheless is covered by the definition of expression 'residence'. Therefore the benefit of Section 54 F of the Act was available.

Against the view of the CIT(A), the revenue preferred an appeal before the Tribunal which has been allowed by the impugned order. According to the view expressed by the Tribunal the assessee could be entitled to deduction in respect of construction of house property if it was constructed within a period of three years of transfer of shares. The period of three years commenced from 22.4.1997 and he was obliged to construct a house by 22.4.2000. Placing reliance on the report of the Inspector and the Municipal Commissioner and also that of Punjab Urban Development Authority, the Tribunal recorded a categorical finding that the assessee had

constructed only two rooms with AC sheets covering area which was less than 150 sq.ft. and there was virtually no construction at the site. It was admitted by the assessee himself before the Assessing Officer that original construction was demolished and even the foundation of that construction was removed. The assessee failed to adduce any evidence to justify his claim showing the construction of house. The Tribunal has also found that the assessee had not constructed any house on the relevant date i.e. 22.4.2000. When the case came up for scrutiny in the financial year 2000-01 the construction of afore-mentioned two rooms covering area of less than 150 sq. ft was found which constituted a basis to make a claim of deduction under Section 54 F of the Act. The onus to prove to succeed in availing the exemption was obviously on the assessee which was never discharged as he did not furnished evidence to prove the construction of the house before 22.4.2000.

We have heard the learned counsel for the assessee and are of the view that pure findings of fact have been recorded by the Tribunal which shows that no benefit under Section 54 F of the Act could be availed as the assessee- appellant has failed to fulfill the primary ingredients of proving the construction of a residential house. Question Nos. (I) and (II) claimed by the assessee-appellant with regard to the circular of the Board would not arise for our determination because the circular No. 667 dated 18.10.1993 is only to the effect that cost of the land is integral part of the aggregate cost of the residential house for the purpose of allowing deduction under Section 54 F of the Act. In the instant case the afore-mentioned issue cannot be adjudicated in the teeth of a categorical finding that no residential house was constructed by the assessee-appellant within a

period of three years from the date of declaration of capital gain on 22.4.1997. Therefore, the first two questions proceed on the assumption that there was a residential house in existence within the meaning of Section 54 F of the Act. Similar would be the position with regard to Question Nos. III to IV because it is well settled that if on the basis of available evidence another view is possible then it cannot be reversed on that basis because it would involve re-appreciation of evidence which is impermissible. Therefore, we find that no question of law much less a substantive question of law would arise within the meaning of Section 260A(1) of the Act.

In view of the above, this appeal fails and the same is dismissed. We do not wish to pass any order on the application under Section 5 of the Limitation Act, 1963 as the appeal itself has been dismissed on merits.

(M.M.Kumar)
Judge

(Ajay Kumar Mittal)
Judge

30.7.2007
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